

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD REUBEIN SACHS,

Defendant-Appellant.

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UNPUBLISHED

March 13, 2008

No. 275560

Monroe Circuit Court

LC No. 05-034614-FC

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and one count of first-degree home invasion, MCL 750.110a(2). He was sentenced to concurrent prison terms of 25 to 50 years for the CSC I convictions, to be served consecutively to a term of 13 to 20 years for the home invasion conviction. We affirm.

Defendant argues that the prosecutor made inappropriate statements during his opening and closing arguments. Because defendant failed to object to these statements in the trial court, we review the prosecutor's comments for plain error that was outcome-determinative. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Issues of prosecutorial misconduct are decided on a case-by-case basis. *Watson*, *supra* at 586. The prosecutor's remarks must be considered in context and in light of the defense arguments. *Id.* at 586, 592-593.

First, defendant maintains that the prosecutor improperly attempted to invoke the jury's sympathy for the victim, who was six years old at the time of the offense, and her mother when he mentioned Mother's Day several times, referred to a "night of horror," and talked about how the mother felt about leaving the window unlocked and failing to protect her daughter. A prosecutor cannot appeal to the jury to sympathize with the victim; however, comments should be considered in context. *People v Abraham*, 256 Mich App 265, 273, 276-277; 662 NW2d 836 (2003). In the present case, the comments did not constitute plain error because the prosecutor did not blatantly appeal to the jury's sympathy, the comments were not so inflammatory that they prejudiced defendant, and the trial court instructed the jurors not to let sympathy influence their decision. See *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003); *Watson*, *supra* at 591-592.

Defendant next argues that the prosecutor improperly denigrated defense counsel by claiming that defense counsel did not understand how DNA analysis worked. A prosecutor cannot personally attack defense counsel; however, comments must be considered in context and may be appropriate if they are a response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996). In the present case, the prosecutor did not personally attack defense counsel but rather responded to his arguments regarding the possibility of human error by arguing that defense counsel did not understand the process.

Defendant next argues that the prosecutor denigrated defendant by saying he committed "such a vile and despicable act to a small child," and by saying "what else is he left with, other than lying and hoping that perhaps it might create a doubt somewhere, which is another despicable act. He's just full of them." The prosecutor must refrain from comments that denigrate the defendant, but again, comments are considered in context. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). The prosecutor is permitted to argue that a defendant who testified was not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor also need not use the blandest language to describe the defendant. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In the present case, the prosecutor was arguing, colorfully, that defendant's testimony was not worthy of belief. This did not rise to the level of plain error requiring reversal.

Defendant additionally argues that the prosecutor shifted the burden of proof when he questioned why defendant did not present witnesses or a hotel receipt to support his testimony that he stayed in a hotel with friends the night the incident occurred. However, the prosecutor did not tell the jury that defendant had the burden of producing the witnesses and other evidence; he merely argued that defendant's failure to corroborate his testimony suggested he was lying. A prosecutor may discuss a defendant's failure to provide witnesses to corroborate his own testimony; this does not constitute shifting the burden of proof. *People v Fields*, 450 Mich 94, 112-117; 538 NW2d 356 (1995). Therefore, there was no plain error requiring reversal.

Defendant also challenges the trial court's decision to depart from the sentencing guidelines. The sentencing guidelines range for the CSC I convictions was 135 to 225 months. The trial court imposed minimum sentences of 300 months, exceeding the guidelines range by 75 months, or 6 and 1/4 years.

A trial court may depart from the statutory sentencing guidelines only if it has a substantial and compelling reason for the particular departure and states that reason on the record. MCL 769.34(3). The departure cannot be based on an offense or offender characteristic that is already considered in the sentencing guidelines unless the court finds that the characteristic was given inadequate or disproportionate weight by the guidelines. MCL 769.34(3)(b); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A "substantial and compelling reason" is defined as a reason that is "objective and verifiable" and that "keenly or irresistibly grab[s] our attention"; is "of considerable worth in deciding the length of a sentence"; and "exist[s] only in exceptional cases." *People v Babcock*, 469 Mich 247, 265-268; 666 NW2d 231 (2003) (internal citations and quotation marks omitted). A reason is "objective and verifiable" if based on confirmable facts external to any person's mind. *Abramski*, *supra* at 74.

This Court should also assess a sentencing guidelines departure under the principle of proportionality, which states that the sentence should be in proportion to the seriousness of the crime and the defendant's criminal history. *Babcock, supra* at 262-264.

The determination of the existence of a factor for departing from the guidelines is reviewed for clear error, the determination that a factor is objective and verifiable is reviewed de novo, and the determination that objective and verifiable factors merited departure from the guidelines range is reviewed for an abuse of discretion. *Id.* at 264-265. The extent of any departure is also reviewed for an abuse of discretion. *People v Lowery*, 258 Mich App 167; 673 NW2d 107 (2003). An abuse of discretion exists when the trial court makes a choice that is not within the range of principled outcomes. *Babcock, supra* at 269-270.

In the present case, the trial court stated that it was departing from the guidelines because of the victim's young age and the resulting emotional impact on her and her family and because defendant lacked remorse. Objective and verifiable characteristics of a crime that make it particularly egregious or repugnant can be sufficient grounds to depart from the guidelines. See *Abramski, supra* at 75. The victim's age was objective and verifiable. The guidelines consider psychological injury and exploitation of a victim's age. However, sexual assault of a young child has particular negative effects, including creating a fear of men and introducing the child to sexual matters at a young age. See *People v Geno*, 261 Mich App 624, 636-637; 683 NW2d 687 (2004), and *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001). The trial court did not err in determining that the sentencing guidelines gave insufficient weight to the objective facts that this case involved the sexual penetration of a six-year-old child and that this substantially and negatively affected her family. It was not an abuse of discretion for the court to use this information as a substantial and compelling reason for a departure from the guidelines range.

The trial court also cited defendant's lack of remorse. A sentencing decision cannot be based in any part on a defendant's refusal to admit guilt. *People v Jackson*, 474 Mich 996, 996; 707 NW2d 597 (2006); *People v Dobek*, 274 Mich App 58, 104; 732 NW2d 546 (2007). However, a sentencing court can consider the defendant's lack of remorse. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *Dobek, supra* at 104. Error is found only if it is apparent that the court based its decision on the failure to admit guilt, indicated by some action like asking the defendant to admit guilt or offering a reduced sentence in exchange for an admission of guilt. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). It is relevant whether the defendant maintained innocence after conviction, whether the judge tried to get the defendant to admit guilt, and whether it appeared the sentence would be less if defendant admitted guilt. *Dobek, supra* at 104.

In the present case, defendant maintained his innocence at the sentencing hearing. However, the trial court did not ask defendant to admit guilt or indicate that his sentence would be reduced if he did. The court specifically cited defendant's lack of remorse rather than his denial of guilt. Therefore, it was not sufficiently apparent that the court increased defendant's sentence because he denied guilt. See *Spanke, supra* at 650. Moreover, we conclude that the

lack of an expression of remorse was objective and verifiable.<sup>1</sup> The trial court did not abuse its discretion when it considered defendant's lack of remorse as a reason to depart from the sentencing guidelines, especially in light of the very young age of and the trauma experienced by the child involved.

Finally, the sentence was not disproportionate to the offender and the seriousness of the offense. See *Babcock, supra* at 262-264.<sup>2</sup>

Affirmed.

/s/ Patrick M. Meter

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

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<sup>1</sup> In *People v Daniel*, 462 Mich 1, 11; 609 NW2d 557 (2000), the Court indicated that a defendant's remorse is not generally an objective and verifiable factor warranting a downward sentencing departure. However, unlike a finding that a defendant is remorseful, a finding that a defendant *has made no expressions of remorse* is in fact objective and verifiable.

<sup>2</sup> We reject defendant's assertion that the consecutive nature of his sentences served to violate the principle of proportionality. See, e.g., *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997).